73-122

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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972
No. A-1182

LOUIE L. WAINWRIGHT, Director
Division of Corrections,

Appellant,

vs. 73-122

RAYMOND R. STONE,

Appellee.

* * *

JAMES F. TOMPKINS, Superintendent,
Florida State Prison,

Appellant,

vs.

EUGENE F. HUFFMAN,

Appellee.

JURISDICTIONAL STATEMENT

RESCUED FOR PRINTED

ROBERT L. SHEVIN
ATTORNEY GENERAL

ANDREW W. LINDSEY
ASSISTANT ATTORNEY
GENERAL

COUNSEL FOR APPELLANTS

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IN THE
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LOUIE L. WAINWRIGHT, Director
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Appellant,

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RAYMOND R. STONE,

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* * *

JAMES F. TOMPKINS, Superintendent,
Florida State Prison,

Appellant,

vs.

EUGENE F. HUFFMAN,

Appellee.

JURISDICTIONAL STATEMENT

The Appellants appeal from the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 19, 1973, affirming the judgment of the United States District Court for the Middle District of Florida entered on November 6, 1972, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States District Court for the Middle District of Florida entered on November 6, 1972, is not yet reported, a copy of which is attached hereto as Appendix A. The opinion of the United States Court of Appeals For the Fifth Circuit, entered on April 19, 1973, is not yet reported, a copy of which is attached hereto as Appendix B.

JURISDICTION

This suit was brought under 28 U.S.C. §1291 to set aside the judgment of the United States District Court for the Middle District of Florida. The judgment of the Fifth Circuit Court of Appeals was entered on April 19, 1973, and the notice of appeal was filed in that court on May 7, 1973. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by title 28 U.S.C. §1254(2). A petition for stay of mandate was denied by the Fifth Circuit Court of Appeals on May 21, 1973. The petition to the United States Supreme Court for a stay of the mandate of the Fifth Circuit Court of Appeals was denied on June 4, 1973. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. Watson v. Employers Liability Assur. Corp., 75

S.Ct. 166, 348 U.S. 66, 99 L.Ed. 635, reh. den. 75 S.Ct. 289, 348 U.S. 921, 99 L.Ed. 722, and Dutten v. Evans, 91 S.Ct. 210, 400 U.S. 74, 27 L.Ed.2d 213. The Fifth Circuit Court of Appeals, on April 19, 1973, affirmed the decision of the United States District Court for the Middle District of Florida holding Section 800.01, Florida Statutes (1971), unconstitutional. Section 800.01, F.S. reads as follows;

> "800.01 Crime against nature; punishment -- Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years."

QUESTION PRESENTED

Did the Fifth Circuit Court of Appeals judgment affirming the Middle District Court's decision, that Section 800.01, Florida Statutes, is unconstitutional, as it is vague and therefore a violation of due process, constitute reversible error?

STATEMENT

The Appellants are the State of Florida, its prison directors Louie L. Wainwright and James F. Tompkins,

and the Appellees are Raymond R. Stone and Eugene F. Huffman. This case began with the Appellee Stone being convicted on May 27, 1970, in the Felony Court of Record in Volusia County Florida, for a violation of Section 800.01, Florida Statutes, to-wit: the abominable and detestable crime against nature, by committing an act of copulation per os and per anum. Appellee Huffman, along with a co-defendant not a party to this appeal, was convicted on November 6, 1968, in the Circuit Court of Pinellas County Florida, for a violation of Section 800.01, Florida Statutes, by committing an act of copulation per anum. The Appellees attacked their convictions in the state courts, which courts denied their requested relief and affirmed their convictions in the lower courts. The Appellees filed petitions for habeas corpus in the United States District Court for the Middle District of Florida alleging Section 800.01, F.S., to be unconstitutionally vague, which court consolidated the cases, and on November 6, 1972, held Section 800.01, Florida Statutes, to be unconstitutional, as it suffers from the constitutional defect of vagueness in violation of due process. The Appellants appealed the decision of the United States District Court for the Middle District of Florida holding Section 800.01, Florida Statutes, to be unconstitutional.

THE ISSUE RAISED ON THIS APPEAL IS SUBSTANTIAL

There are presently 22 states in which it is a crime to, "commit the crime against nature", however, Colorado, Louisiana, Mississippi and Wyoming have modified the traditional language prohibiting the crime against nature by the use of portions of the language more commonly found in those states who make it a crime to participate in deviate sexual behavior. Thus, 18 states have statutes whose language is similar, if not identical, to the language of the Section 800.01, Florida Statutes, which has been held unconstitutional by the United States Court of Appeals, for the Fifth Circuit.

The law in the State of Florida has long been that early court decisions become a part of the statutes and the law of the State for purposes of notice, indeed as the Supreme Court of Florida pointed out in a previous attack on the constitutionality of Section 800.01, Florida Statutes:

> "[9] The real question before us, then, is whether these earlier constructions of the statute have become a part of the statute and the law of this state in the sense that these decisions, together with the statutory language,

> afforded the appellant sufficient notice that acts committed per os as well as per anum were prohibited by the statute. We hold that they did.
>
> [10] In this state, as in most others, the rule prevails that in reenacting a statute the legislature is presumed to be aware of constructions placed upon it by the highest court of the state, and, in the absence of clear expressions to the contrary, is presumed to have adopted these constructions." Delaney v. State, 190 So.2d 578 at 581

The Supreme Court of Florida in the case of Delaney, supra, and previous cases has long held the acts of copulation per os and per anum committed by the Appellees to be a violation of Section 800.01, Florida Statutes, and that holding provides the notice that would sustain the constitutionality of Section 800.01. At the time of the Appellees' convictions and appeals, the law of Florida was as set out in Delaney and their earlier decisions interpreting Section 800.01, Florida Statutes. Ephraim et al. v. State, 1921, 82 Fla. 93, 89 So. 344; Jackson v. State, 1922, 84 Fla. 646, 94 So. 505; English v.

State, 1935, 122 Fla. 77, 164 So. 848; Lason v. State, 1943, 152 Fla. 440, 12 So.2d 305; Fine v. State, 1943, 153 Fla. 297, 14 So.2d 408, and McElveen v. State, Fla. 1954, 72 So.2d 785. This was further pointed out by the Supreme Court of Florida in the case of Franklin v. State, 257 So.2d 21 (Fla. 1971), decided after the Appellees' appeal was final. In Franklin the Supreme Court of Florida receded from its decision in Delaney v. State, supra, and held Section 800.01, Florida Statutes, to be unconstitutional, prospectively only, citing Delaney and its previous cases, as the controling law for those persons whose conviction and appeal was final prior to the Franklin decision. The basis of the decision of the Florida Supreme Court in Franklin to hold Section 800.01, Florida Statutes, unconstitutional prospective only, was entirely procedural. The Florida Supreme Court pointed out in Delaney, Section 800.01, Florida Statutes, had been held constitutional in the past because of the case law interpreting it, and in Franklin the Supreme Court of Florida decided they were no longer going to look to the past cases interpreting Section 800.01, Florida Statutes, and making it constitutional. Thus, without the cases it was unconstitutionally vague. A ruling that does not raise any federal question as this court in Great Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932), stated:

> "This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal. We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." at page 364

The court in Linkletter v. Walker, 381 U.S. 618 (1965), 14 L.Ed.2d 601, 85 S.Ct. 1731, stated in quoting Mr. Justice Cardozo's opinion in Great Northern R. Co., supra,

> "He said that a state may make a choice for itself between the principle of forward operation and that of relation backward. And that he based the rule on the avoidance of injustice or hardship." at page 606

and stated;

> "However, we believe that the constitution neither prohibits or requires

> retroactive effect as Justice Cardoza said, 'We think the Federal Constitution has no voice upon the subject.'" at page 608

Federal Courts have long adhered to the rule that state law as determined and interpreted by the highest court of the state is to be followed as a rule of decision in Federal Courts. Vandenbark v. Owens-Illinois Glass Company, 311 U.S. 538, 85 L.Ed.327, footnote 21, at page 543. The same point was made in Baggett v. Bullet, 377 U.S. 360, 12 L.Ed.2d 377, 84 S.Ct. 1316 (1964), where this court stated in reference to a state supreme court construction of a state statute:

> "United States Supreme Court will accept the construction given by its highest court to a state statute."

In Terminiello v. City of Chicago, 377 U.S. 1-37, 93 L.Ed. 1131 (1949), when this court said, "we can only take the statute as the state courts read it" (at 1135). And again in Kingsley Corp. v. Regents of U. of N.Y., 360 U.S. 684 3 L.Ed.2d 1512, 79 S.Ct. 1362 (1959), where it is stated:

> "We accept the premise that the motion picture here in

> question can be so characterized. We accept too, as we must, the construction of the New York Legislature's language which the Court of Appeals has put upon it." (Emphasis supplied)

As pointed out in our reply brief in the United States Court of Appeals for the Fifth Circuit, at page five, as part of the argument that Section 800.01, Florida Statutes, was constitutional as applied to the Respondents Stone and Huffman, in 1967, in the State of Florida, Mr. Delaney was convicted of a violation of Section 800.01, Florida Statutes, and on appeal to the Supreme Court of Florida, the Supreme Court of Florida held the earlier construction of Section 800.01, Florida Statutes, are a part of the statute and the law of this State, when they said:

> "[9] The real question before us, then, is whether these earlier constructions of the statute have become a part of the statute and the law of this state in the sense that these decisions, together with the statutory language, afforded the appellant sufficient notice that acts committed per os as well as per anum

> were prohibited by the statute. We hold that they did.
>
> [10] In this State, as in most others, the rule prevails that in reenacting a statute the legislature is presumed to be aware of constructions placed upon it by the highest court of the state, and, in the absence of clear expressions to the contrary, is presumed to have adopted these constructions."

Delaney then took a direct appeal to the United States Supreme Court alleging in his brief at pages 3-4, attached hereto and made a part hereof as Appendix C, that Section 800.01, Florida Statutes, was unconstitutional in violation of the Fourteenth Amendment, as it failed to give due notice of criminally proscribed conduct. This Court in dismissing the appeal, held that Delaney, in his attack on the constitutionality of Section 800.01, Florida Statutes, had failed to raise a substantial federal question. Thus, in 1967, the United States Supreme Court, when presented with the issue that Section 800.01, Florida Statutes, was vague and a conviction for a violation of Section 800.01 was unconstitutional, held the appellee Delaney

failed to raise a substantial federal question when Section 800.01, Florida Statutes, read as follows:

> "800.01 Crime against nature; punishment. -- Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years."

and was interpreted by the Supreme Court of Florida to prohibit copulation per os and per anum. This was the same statute with the same interpretation by the Supreme Court of Florida that five years later, the Federal District Court for the Middle District of Florida in Stone v. Wainwright and Huffman v. Tompkins, and the United States Court of Appeals for the Fifth Circuit in the same case, held to be unconstitutional. The opinion by the Fifth Circuit Court of Appeals, pointed out at page five that the United States District Court held, in Stone v. Wainwright and Huffman v. Tompkins:

> "On the merits, it is clear that §800.01 which makes it a felony to commit 'the abominable and detestable crime against nature,' suffers from the constitutional

> defect of vagueness in violation of due process. Severson v. Duff, 322 F.Supp. 4 (M.D. Fla. 1970); Franklin v. State, supra."

The opinion by the Middle District Court and the Fifth Circuit Court of Appeals in this case holding Section 800.01, Florida Statutes, to be unconstitutional was based either on an interpretation of Section 800.01, F.S., by the two courts without using the interpretation of the Supreme Court of Florida in the Delaney case, or was based on an interpretation by the Supreme Court of Florida in Delaney. If the former proposition is the case, the decision of the Middle District Court and the Fifth Circuit Court, are in direct conflict with the cases of Terminiello, Kingsley and Baggett, supra, and if the later proposition is the case, then the decision in the Middle District Court and the Fifth Circuit Court in holding Section 800.01, F.S., unconstitutional is in direct conflict with the opinion by the United States Supreme Court in Delaney, where that court held the issue, that a conviction for a violation of Section 800.01, Florida Statutes. which was alleged to be unconstitutionally vague, failed to raise a substantial federal question.

It is submitted that the decision of the Fifth Circuit Court of Appeals fails to recognize that the previous

cases in the State of Florida interpreting the words "the abominable and detestable crime against nature" to prohibit copulation per os and per anum, provide the requisite clarity and description of the prohibited acts that prevent Section 800.01, Florida Statutes, from being vague and therefore, unconstitutional, and that the question presented by this appeal is substantial and of great public importance.

Respectfully submitted,

ROBERT L. SHEVIN
ATTORNEY GENERAL

ANDREW W. LINDSEY
Assistant Attorney General

COUNSEL FOR APPELLANTS

PROOF OF SERVICE

This is to certify that I have forwarded copies of the foregoing Jurisdictional Statement to Appellees' counsel Lynn E. Wagner, Director, Prisoner Legal Assistance Project, Legal Aid and Defender Clinic, University of Florida College of Law, Gainesville, Florida, and further, that all parties required to be served have been served this _____ day of July, 1973.

ROBERT L. SHEVIN
Attorney General

ANDREW W. LINDSEY
Assistant Attorney
General

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EUGENE F. HUFFMAN,

Petitioner,

vs.

JAMES F. TOMPKINS, Superintendent
Florida State Prison,

Respondent.

AND

RAYMOND R. STONE,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Director,
Division of Corrections,
State of Florida,

Respondent.

ORDER

In support of their petitions for writ of habeas corpus, petitioners, Raymond R. Stone and Eugene F. Huffman, allege that they are serving sentences as a result of their convictions for

violating §800.01 of the Florida Statutes. Petitioner Stone alleges that he was convicted in The Felony Court of Record of Volusia County on May 27, 1970, on two counts under §800.01 and was sentenced to five years imprisonment on each count to be served consecutively. Petitioner Huffman alleges that he was convicted in the Circuit Court for the Sixth Judicial Circuit of Florida on November 6, 1968, on one count under §800.0- and was sentenced to six months to ten years imprisonment. Both petitioners allege that their convictions and sentences were imposed in violation of the due process clause of the fourteenth amendment to the United States Constitution in that the language of §800.01 is so vague, ambiguous and uncertain that it fails to give adequate notice of the conduct that constitutes an offense.

From the petitions, it appears that both petitioners have exhausted available state remedies as required by 28 U.S.C. §2254(b).

In Franklin v. State, 257 So.2d 21, 24 (1971), the Florida Supreme Court held that §800.01 "is void on its face as unconstitutional for vagueness and uncertainty in its language." The Court concluded, however, by stating "this judgment holding the felony statute void is not retroactive but prospective only." 257 So.2d at 24 Subsequently, petitioner Stone moved

to have his convictions and sentences vacated on the ground that §800.01 was void for vagueness. Stone was denied relief by the Florida Courts based on the prospective only dictum in Franklin. Stone v. State, 264 So.2d 81 (1st DCA, Fla. 1972), cert. den'd, _____ So.2d _____ (Fla., Sept. 26, 1972). In light of the foregoing it would likewise be futile for petitioner Huffman to pursue relief in the Florida Courts. Fay v. Noia, 372 U.S. 391 (1963); Severson v. Duff, 318 F.Supp. 17 (M.D. Fla. 1970).

Since petitioners ask this Court to determine for the first time that §800.01 is unconstitutional and void for vagueness, no issue of retroactivity arises in this case. Therefore, this Court need not reach the issue of whether the Florida Supreme Court correctly concluded that Franklin v. State, should not be given retroactive effect. On the merits it is clear that §800.01, which makes it a felony to commit "the abominable and detestable crime against nature," suffers from the constitutional defect of vagueness in violation of due process. Severson v. Duff, 322 F.Supp. 4 (M.D. Fla. 1970); Franklin v. State, supra.

It is, therefore,

ORDERED:

Petitioners shall be forthwith released.

DONE AND ENTERED at Jacksonville, Florida, this 6th day of November, 1972.

_____
Chief Judge

copies mailed to:

MR. EUGENE F. HUFFMAN, No. 022432,
P. O. Box 221, Raiford, Florida
MR. RAYMOND R. STONE
P. O. Box 221, Raiford, Florida
LYNN E. WAGNER, DIRECTOR, Prisoner Assistance Project, Legal Aid and Defender Clinic, University of Florida, Gainesville, Florida
THE HONORABLE ROBERT L. SHEVIN, Attorney General, State of Florida, Tallahassee, Florida

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3738
Summary Calendar*

RAYMOND R. STONE,
Petitioner-Appellee,

versus

LOUIE L. WAINWRIGHT, Director, etc.,
Respondent-Appellant.

EUGENE P. HUFFMAN,
Petitioner-Appellee,

versus

JAMES F. TOMPKINS,
Respondent-Appellant.

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*Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, 5 Cir. 1970, 431 F.2d 409, Part I.

2 RAYMOND STONE v. LOUIE L. WAINWRIGHT

Appeal from the United States District Court for the Middle District of Florida

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(April 19, 1973)

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

GOLDBERG, Circuit Judge: This is an appeal by the State of Florida from the granting of federal habeas relief to two men who had been convicted of violating Florida's "felony sodomy statute," FLA. STAT. ANN. §800.01. Subsequent to the trials at which petitioners were convicted, the Supreme Court of Florida held Section 800.01 to be "void on its face as unconstitutional for vagueness and uncertainty in its language."[1] The Florida Supreme Court went on in that case, however, to say that its decision was "not retroactive, but prospective only,"[2] and the State now insists that that determination is binding upon the federal courts. We cannot agree. It is always the duty of a federal court to grant habeas relief whenever it independently determines that a person is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254. We hold that relief under the Great Writ was properly granted when the United States District Court independently and correctly found that the statute under which petitioners were convicted and imprisoned was void.

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[1]Franklin v. State, 257 So.2d 21, 24 (Fla. Sup. Ct. 1971).
[2]*Id.*

RAYMOND STONE v. LOUIE L. WAINWRIGHT 3

I. HISTORY OF THE INSTANT CASES

Petitioner Stone was tried and convicted in 1970 on two counts of violating Section 800.01, FLA. STAT. ANN., and was sentenced to serve consecutive five-year terms of imprisonment. His conviction was affirmed on direct appeal, *Stone v. State*, 245 So.2d 91 (Fla. Dist. Ct. App. 1970), and the state court's denial of his subsequent motion for post-conviction relief was also affirmed. *Stone v. State*, 264 So.2d 81 (Fla. Dist. Ct. App. 1972), *cert. denied*, 267 So.2d 329 (Fla. Sup. Ct. 1972). Petitioner Huffman was tried and convicted in 1968 on one count of violating Section 800.01 and was sentenced to serve from six months to ten years imprisonment. Huffman did not appeal from his conviction, but it is not argued that he has failed to exhaust any available state remedies.[3]

The statute under which petitioners were convicted reads as follows:

> *"800.01 Crime against nature; punishment*
>
> "Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years."

---

[3]Apparently acting in the light of Florida's refusal to apply Franklin v. State, *supra* note 1, the case finding § 800.01 void, retroactively, *see* Stone v. State, 264 So.2d 81 (Fla. Dist. Ct. App. 1972), the United States District Court specifically found that both Huffman and Stone have exhausted all available state remedies.

FLA. STAT. ANN. § 800.01. As recently as 1966, the Florida Supreme Court was continuing to adhere to its long line of cases upholding the constitutionality of this statute in the face of repeated challenges urging that it was impermissibly vague and failed to afford persons in Florida notice of precisely what acts constituted violations of the statute. *See, e.g., Delaney v. State,* 190 So.2d 578 (Fla. Sup. Ct. 1966); *Lason v. State,* 12 So.2d 305 (Fla. Sup. Ct. 1943). Thus, at the time petitioners were convicted, the State of Florida considered its statute to be free of constitutional infirmity.

After the dates on which petitioners were convicted and before petitioners filed these consolidated actions, the Florida Supreme Court rendered its decision in *Franklin v. State,* 257 So.2d 21 (Fla. Sup. Ct. 1971), declaring the statute void for vagueness. The Florida Supreme Court explicitly limited its decision to prospective application, and as a result, the State has subsequently denied one of the instant petitioners any relief under *Franklin.*[4]

Petitioners thereafter filed the instant habeas actions in the United States District Court. Although the wording of their *pro se* petitions was somewhat imprecise, petitioners were clearly seeking relief on allegations that their confinement was in contravention of the United States Constitution.[5] The United States Dis-

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[4]*See* note 3 *supra.*

[5]Petitioner Stone alleged, *inter alia:*

> "Florida Statutes, chapter 800.01, et seq., applied or on its face is unconstitutional because of being too overly vague, indefinite, indistinct, etc., as to not ap-

trict Judge agreed that the statute was too vague in its wording to withstand constitutional scrutiny:

> "On the merits, it is clear that § 800.01, which makes it a felony to commit 'the abominable and detestable crime against nature,' suffers from the constitutional defect of vagueness in violation of due process. *Severson v. Duff*, 322 F.Supp. 4 (M.D. Fla. 1970); *Franklin v. State, supra.*"

Habeas relief was accordingly granted by the court below, and the question now before us is whether that action was proper.

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prise one of the nature and cause of accusation as well as 'fails to give a person of ordinary intelligence [notice] that his contemplated conduct is forbidden by the statute,' United States v. Harriss, 347 U.S. 612, 617 (1942) [*sic*, 1954]; Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939), constituting a violation of due process under Fourteenth Amendment. Florida Supreme Court voided the statute but refused to hold it retroactive. See Franklin v. State . . . But in Ex parte Siebold, 100 U.S. 371, 376-77, U.S. Supreme Court held: 'An unconstitutional law is void, and is as no law. An offense created by it is not a crime.' There is no legal cause for petitioner's imprisonment under this *void* law."

Petitioner Huffman alleged, *inter alia:*

> "Florida Statute, chapter 800.01, is unconstitutional for vagueness and overbreadth inasmuch as it fails to inform the average person of common intelligence as to what is prohibited so that one need not speculate as to the statutory meaning. See *Franklin v. State* 257 So.2d 21 (Fla. 1971)."

6 RAYMOND STONE v. LOUIE L. WAINWRIGHT

II. "SODOMY STATUTES" UNDER THE CONSTITUTION

Statutes prohibiting consensual sodomy have increasingly come under constitutional attack in recent years.[6] The challenges that have been brought fall into a wide variety of imaginative theories that can be categorized in two general groups. The first grouping is premised on the theory that the state is without power to regulate consensual sodomy and other sexual activities between or among consenting adults. Specific arguments that have been advanced include allegations that such statutes unconstitutionally (1) invade a penumbral right to privacy,[7] (2) establish a religion by promoting nonsecular religious morals,[8] (3) impose cruel and unusual punishment by penalizing a condition (homosexuality),[9] (4) impinge First Amendment expressional freedoms,[10] and (5) violate due process standards by criminalizing conduct absent either a "rational basis" or a "compelling state interest."[11]

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[6] *See generally*, Note, 49 TEXAS L. REV. 400 (1971).

[7] *E.g.*, Buchanan v. Batchelor, N.D. Tex. 1970, 308 F.Supp. 729, *vacated sub nom.* Wade v. Buchanan, 401 U.S. 989, 91 S.Ct. 1221, 28 L.Ed.2d 526, *noted in* 49 TEXAS L. REV. 400 (1971); Cotner v. Henry, 7 Cir. 1968, 394 F.2d 873 (dictum), *cert. denied*, 393 U.S. 847, 89 S.Ct. 132, 21 L.Ed.2d 118; *Towler v. Peyton*, W.D. Va. 1969, 303 F.Supp. 581 (right to privacy issue not reached because conviction was for forceful sodomy)

[8] Note, 49 TEXAS L. REV. 400, 405 (1971).

[9] Perkins v. North Carolina, W.D. N.C. 1964, 234 F.Supp. 333, 336-37 (dictum).

[10] Raphael v. Hogan, S.D. N.Y. 1969, 305 F.Supp. 749 (on-stage acts of sodomy during a performance of the play "Che!").

[11] This argument was advanced in Buchanan v. Batchelor, *supra* note 7, and Dawson v. Vance, S.D. Tex. 1971, 329 F.Supp. 1320.

The second general category of attacks against sodomy statutes consists of arguments that admit that the state may permissibly regulate some instances of consensual sodomy but argue that the particular statute involved is constitutionally defective. Perhaps the most common example of this argument is the theory that marital privacy is protected by the Constitution.[12] and that therefore any statute that could be or is used to prosecute married persons is unconstitutionally overbroad.[13] Another example is the attack based on the vagueness with which the acts sought to be proscribed are often defined. The term "sodomy" originated in the Bible[14] and appears in the common law,[15] but the various states have, perhaps for euphemistic reasons, selected terms even more arcane than "sodomy," such as "buggery" or "the crime against nature."[16] Thus, when the common citizen is faced with prosecution under a statute employing such indefinite phraseology,[17] he may argue that due process is violated

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[12] *See, e.g.*, Comment, *The Bedroom Should Not Be Within the Province of the Law*, 4 CAL. W.L. REV. 115 (1968).

[13] The specific holding of the lower court in Buchanan v. Batchelor, *supra* note 7, was that the Texas statute prohibiting sodomy is unconstitutionally overbroad in proscribing private, consensual acts of married couples. The prosecutions in both Cotner v. Henry, *supra* note 7, and Towler v. Peyton, *supra* note 7, involved marital sodomy.

[14] *E.g.*, *Genesis* 13:13; *id.* 18:20. *See also Leviticus* 18:22 ("Thou shalt not lie with mankind, as with womankind: it is abomination.").

[15] *E.g.*, Regina v. Jacobs, R. & R. C.C. 331 (1817). For a concise history of early British law regarding sodomy see Comment, *supra* note 12, at 115-16.

[16] The terms employed by the various states are compiled at Comment, *supra* note 12, at 116.

[17] The State does not dispute that more precise and understandable words are available. *See, e.g.*, Note, *supra* note 8, at 400 n. 10. *See also* Tex. Penal Code Ann. art. 524 (1952).

inasmuch as the statute is so vague and lacking in ascertainable standards of guilty conduct as to be incapable of giving a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.[18] *See Palmer v. City of Euclid*, 1971, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98; *United States v. Harriss*, 1954, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989; *Lanzetta v. New Jersey*, 1939, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888.

The application of these arguments and theories to specific factual situations is often difficult and confusing, involving considerable overlapping and duplication. We think it clear beyond peradventure, however, that the instant appeal presents only an attack on the vagueness found by the District Court to be present in Section 800.01.

III. THE FEDERAL DISTRICT COURT'S DETERMINATION THAT SECTION 800.01 IS UNCONSTITUTIONALLY VAGUE

Almost fifty years have passed since the Supreme Court of the United States penned the classic statement regarding the level of linguistical vagueness that a criminal statute must exceed if it is to satisfy due process standards:

> "[That the words of a criminal statute] must be sufficiently explicit to inform those who are subject to it what conduct on their

[18] E.g., Franklin v. State, 257 So.2d 21 (Fla. Sup. Ct. 1971).

> part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Connally v. General Construction Co., 1926, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322, 328. In subsequent years, the Supreme Court has many times had occasion to restate the rule, as when it said:

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgressions. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

Lanzetta v. New Jersey, supra, 306 U.S. at 453, 83 L.Ed. at 890 (citations omitted). *See also Palmer v. City of Euclid, supra; United States v. Harris, supra.*

The standard by which the Constitution requires criminal statutes to be judged is clear. Here, the United States District Judge considered the language of section 800.01 and found it to be fatally vague. In making this determination, Judge McRae's independent federal finding that the statute fails to advise those

who may be convicted under it of precisely what behavior is proscribed was neither new or unsupported. In fact, the Supreme Court of Florida had previously found that this precise statute's terminology is impermissibly indefinite. In a thoughtful and well-reasoned opinion, the Florida high court stated as follows:

> "We have over a long period of time upheld the statute despite earlier constitutional challenges. We are persuaded that these holdings and this statute require our reconsideration. One reason which makes this apparent is the transition of language over the span of the past 100 years of this law's existence. The change and upheaval of modern times are of drastic proportions. People's understandings of subjects, expressions and experiences are different than they were even a decade ago. The fact of these changes in the land must be taken into account and appraised. Their effect and the reasonable reaction and understanding of people today relate to statutory language.
>
> "The blindfold upon our Lady of Justice is symbolic of impartiality, as being blind to all outside influences which would divert from the material facts and law applicable to the case in which justice is being sought upon its merits. Her blindfold in no wise suggests that justice should be blind to the facts of life and of the times in which it functions; for the law, to be vibrant, must be a living thing, responsive to the society which it serves, and to which that

society looks as the last true depository of truth and justice.

"A further reason dictating our reexamination here is the expansion of constitutional rulings on the invasion of private rights by state intrusion which must be taken into account in the consideration of this statute's continuing validity. The language in this statute could entrap unsuspecting citizens and subject them to 20-year sentences for which the statute provides. Such a sentence is equal to that for manslaughter and would no doubt be a shocking revelation to persons who do not have an understanding of the meaning of the statute."

Franklin v. State, 257 So.2d 21, 23 (Fla. Sup. Ct. 1971) (citations omitted).

As did the District Court, we agree with the Florida Supreme Court that the words "abominable and detestable crime against nature" are fatally vague. Convictions obtained under this statute, rendered void by its vagueness, are repugnant to the Constitution and cannot stand. We hold that the United States District Court properly reached an independent conclusion that the language of this particular statute is fatally vague and that imprisonment pursuant to a conviction under Section 800.01 contravenes the Constitution's guarantee of due process.

IV. INDEPENDENCE OF THE FEDERAL HABEAS POWER

Although this appeal is disposed of and affirmed by what we have thusfar stated, the vigor with which the briefs filed on behalf of the State of Florida argue certain other issues said to be present in this appeal justifies a few additional words. We have carefully considered the three remaining arguments that the State weaves throughout its briefs, and we conclude that each is without legal merit. The essential difficulty with these issues is that each misconceives the precise nature of the trial court's holding.

First, the State argues that it is improper for a federal court to "apply" that part of the *Franklin* decision that holds Section 800.01 unconstitutional while "ignoring" that portion of the Florida opinion that states the holding is prospective only. We do not find that this is what the federal habeas court actually did; rather, we view the action below as being an independent federal determination that Section 800.01 is void for vagueness. The federal judge was guided and buoyed in his resolution of this question by the sagacious words of the Florida Supreme Court, but the decision was nonetheless a federal judge's independent determination of a question under the federal Constitution.

Second, the State presents the unusual argument that because the Florida Supreme Court has already "voided" the statute, "there was nothing for the District Court to hold unconstitutional ... an unconstitutional statute in a criminal area is to be considered no stat-

ute at all." This argument misconceives the nature of a petition for a writ of habeas corpus. Petitioners were not asking for a "second" declaratory judgement that Section 800.01 was fatally vague — they sought release from confinement in prison, a confinement that rested solely on violations of what the State says is "no statute at all." The District Court did not order relief because petitioners were held under a statute that was voided by the Florida courts; rather, the court below ordered petitioners released because they were being held in physical custody pursuant to convictions of violating a statute that the federal court found to be repugnant to the Fourteenth Amendment.

Third, the State argues that the federal courts are "bound" by state court decisions regarding the retroactivity of state court holdings. We find that none of the cases cited by the State on this issue are relevant to the case before us.[19] The cases sought to be relied upon involve either questions of non-constitutional dimension[20] or instances where the relief sought is retrial under the new decisional pronouncement.[21] Here,

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[19]Linkletter v. Walker, 1965, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 1731; Great Northern Ry. v. Sunburst Oil & Refining Co., 1932, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360; Smith v. Maryland, 4 Cir. 1966, 362 F.2d 763; Redd v. Decker, 5 Cir. 1971, 447 F.2d 1346; Smith v. Brough, D. Md. 1965, 248 F.Supp. 435.

[20]Great Northern Ry. v. Sunburst Oil & Refining Co., *supra* note 19 (a state's non-constitutional decisions may constitutionally be denied retroactive application); Redd v. Decker, *supra* note 19 (non-constitutional evidentiary decisions may be denied retroactive application).

[21]Linkletter v. Walker, *supra* note 19 (one species of the exclusionary rule may be denied retroactive application); Smith v. Maryland, *supra* note 19 (requirement that non-believers not be excluded from jury service may be denied retroactive application); Smith v. Brough, *supra* note 19 (*Smith v. Maryland* in District Court).

however, petitioners assert a constitutional right to be totally free from prosecution under a void criminal statute. The usual considerations present in retroactivity cases, such as the degree the state will be burdened by a requirement that it re-conduct a host of trials, are simply not present.[22] Under our decision the State of Florida is not prevented from re-enacting a "sodomy statute" that meets the Constitution's demand for terminological specificity — but Section 800.01 being void, the State may not retry petitioners. Indeed, the instant case is little more than a situation where persons are currently confined pursuant to convictions obtained under a statute that has been determined by the federal court to have been void at the time petitioners performed the acts said to have violated it. Cast in those terms, there can be little question that relief was surely appropriate.

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[22] *See generally* Vacarro v. United States, 5 Cir. 1972, 461 F.2d 626 (1972), where Chief Judge Brown wrote a scholarly and probing opinion analyzing the state of the law regarding retroactivity. Surveying the entire body of the relevant law, particularly as developed in the Supreme Court, Chief Judge Brown concluded:

> "We distill from this whole body of cases the Court's value judgment that people are not to be punished for the same offense twice, are not to be punished at all for actions which are constitutionally immune from punishment, and are not to be punished by procedures which present 'a serious risk that the issue of guilt or innocence may not have been reliably determined,' or which produce a 'clear danger' of convicting the innocent. Practices, procedures or *statutes* which present the probability or risk of such consequences must be eradicated and the surest way is to prescribe retroactivity."

461 F.2d at 633 (emphasis added, footnotes omitted).

Finally, underlying the State's position in this appeal is the implicit argument that although the federal court could grant habeas relief upon finding that the statute offends the Constitution if the Florida courts had found no constitutional infirmity in the statute, the federal court is somehow divested of its habeas power by the State court's decision that the statute is unconstitutional. To support this implication, the State makes repeated reference to the *Franklin* case being nothing but a "matter of procedure." Such an argument cannot prevail:

> "[T]he doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute."

Fay v. Noia, 1963, 372 U.S. 391, 399, 83 S.Ct. 822, 9 L.Ed.2d 837, 845.

Fay v. Noia reached the Supreme Court in a different posture than that in which the instant appeal comes before us, but *Fay v. Noia* speaks so thoroughly to the independence of the federal habeas power that we are much guided by it. The Supreme Court has removed from the jurisprudence any notion that a state court's determination of federal constitutional rights must be given binding weight.[23] Florida thus cannot argue that its determination regarding retroactivity

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[23] *Fay v. Noia*, *supra*, at §§ II, III.

of the *Franklin* holding ousts federal habeas jurisdiction. "The jurisdictional prerequisite is ... detention simpliciter." *Fay v. Noia, supra,* 372 U.S. at 430, 9 L.Ed.2d at 864.

The Great Writ is one of the most precious creations of our Anglo-American heritage. As guardians of the rights that the Constitution secures to every person, regardless of his station in life, we must be ever vigilant that the availability of the Writ is never diminished. The propriety of its use in the instant case is indisputable:

> "[Behind the seemingly extravagant expressions regarding the Great Writ] may be discerned the unceasing contest between personal liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with

> the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office."

Fay v. Noia, 372 U.S. at 401-02, 9 L.Ed.2d at 846-47.

With all due deference to the sovereignty of states, the power is not given unto any state to suspend, limit, or condition with prospectivity a *constitutional* right such as that before us. As was said long ago, it is a federal Constitution we are expounding. *See McCulloch v. Maryland*, 1819, 17 U.S. [4 Wheat.] 316, 407, 4 L.Ed. 579, 602. Florida cannot veto, nullify, or suspend a right that the Constitution grants to all persons, and the revered Writ is ever at the ready to answer the distress calls of its wards.

AFFIRMED.

RONEY, Circuit Judge, specially concurring:

I concur in the disposition of this case on our Summary Calendar only because the Supreme Court of Florida has held that the statute under which the defendants were convicted is constitutionally *void on its face.*

> The statute, § 800.01, is void on its face as unconstitutional for vagueness and uncertainty

> in its language, violating constitutional due process to the defendants.

Franklin v. State, 257 So.2d 21, 24 (Fla. 1971).

The State has not argued in its brief that the statute can withstand the due process requirements of the United States Constitution. Nor, as pointed out by Judge Goldberg, has the State cited any authority which could support a denial of habeas corpus relief by the District Court to defendants who have been convicted under a statute which has been determined to be vague and uncertain on its face to charge *any* crime.

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APPENDIX C

2. Does Florida Statutes, Section 800.01, if construed to apply to consenting adults allegedly attempting to porform cunnilingus in private violate the due process clause of the Fourteenth Amendment (a) in being void for vagueness; (b) by failing to give due notice of the criminally proscribed conduct;